Supreme Court, U.S.
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No. 00-1903

In The

Supreme Court of the United States

ROGER AND VIRGINIA GALLAND,

Petitioners,

v.

CITY OF CLOVIS, CLOVIS CITY COUNCIL, and CLOVIS MOBILE HOME RENT COMMISSION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

RESPONDENTS' BRIEF IN OPPOSITION

THOMAS J. RIGGS, *Counsel of Record*
DAVID J. WOLFE
LOZANO SMITH
285 W. Bullard Avenue, Suite 101
Fresno, CA 93704
(559) 431-5600

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners have filed a brief that is skillfully written and entertaining to read. It does not, however, accurately portray the decision of the California Supreme Court. Utilizing rather flamboyant political rhetoric, petitioners seek to characterize this as a land use and takings decision when, in fact, it is a decision well within the mainstream of the law governing price control regulation in the highly regulated mobile home park industry.

There are two principal holdings in this case. First, the California Supreme Court articulated the standard a trial court must use for determining whether the application of price controls in a regulated mobile home park has resulted in confiscatory rent regulation. (Pet. App. 30-34.)[1] Second, the California Supreme Court articulated the standard a trial court must follow for determining whether the actual conduct of the administrative rent control proceedings is so arbitrary and burdensome as to amount to a violation of substantive due process. (Pet. App. 44-45.) It is critical to note that the California Supreme Court did not hold that confiscatory rent regulations were imposed, and did not hold that the conduct of the administrative rent control proceedings amounted to a violation of petitioners' substantive due process rights. Instead, the California Supreme Court remanded the case to the trial court to make these factual and legal determinations based upon the standards articulated in its decision. (Pet. App. 2, 30, 51, 57.) Petitioners' contention

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[1] The Appendices to the Petition for Certiorari are cited as "Pet. App. ___." The Appendices to this Brief in Opposition are cited as "App. ___."

that the City of Clovis imposed confiscatory rents and that petitioners have been denied relief under 42 U.S.C. § 1983 are wrong. These issues will be decided after further proceedings upon remand. There is no final judgment upon which this court may grant review. (28 U.S.C. § 1257; *Florida v. Thomas*, ___ U.S. ___, 121 S. Ct. 1905, 1908-1909 (2001); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 633 (1981).)

In addition, the California Supreme Court's decision does not conflict with the decision of another state court of last resort, a decision of a United States court of appeals, or relevant decisions of this Court. Nor has the California Supreme Court decided an unsettled question that needs resolution by this Court. There are no compelling reasons to grant review. (Supreme Court Rule 10.)

STATEMENT OF THE CASE

The City of Clovis respectfully submits that the published opinion of the California Supreme Court contains an accurate description of the proceedings below. The Gallands' statement of the case is misleading and inaccurate in a number of respects which are discussed below.

This case arises out of a dispute between the Gallands and the home owners in the Woods Mobile Home Park owned by the Gallands. The home owners are senior citizens on fixed incomes. Every year the Gallands impose rent increases on the home owners for renting pads in the park. At issue here are the rent increases imposed in 1988, 1989, and 1990.

As this Court noted in *Yee v. Escondido*, 503 U.S. 519, 523 (1992) the term "mobile home" is misleading. Mobile home owners have substantial investments in their homes and once placed on pads are usually never moved. If sold, the homes are sold in place. The California Supreme Court, relying upon research done by noted author Kenneth Baar,[2] observed that the immobility of mobile homes, the substantial investment of the mobile home owner, and the restriction on mobile home spaces, "has sometimes led to what has been perceived as an economic imbalance of power in favor of the mobile home park owners [ ] that has in turn led many California cities to adopt mobile home rent control ordinances [ ]." (Pet. App. 3-4.) The City of Clovis has such an ordinance.

In accordance with the City of Clovis' former ordinance, the home owners petitioned the then existing Rent Review Commission to review the 1988, 1989, and 1990 rent increases for reasonableness with the understanding that the Gallands were entitled to a fair return on their investment. (Pet. App. 163-164.) The former Rent Review Commission approved approximately 50% of the requested rent increases. Those rent increases were affirmed by the City Council. Pursuant to the former ordinance and a stay order issued by the trial court, the Gallands were entitled to collect all of the requested 1989 and 1990 rent increases pending the trial court's decision but opted not to do so.

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[2] Baar, *The Right to Sell the "Im" mobile Manufactured Home in Its Rent-controlled Space in the "Im" mobile Home Park: Valid Regulation or Unconstitutional Taking?*, 24 Urb. Law. 157 (1992).

The Gallands contend that the rent review process deprived them of fair hearings in violation of their procedural and substantive due process rights. They asserted a number of procedural errors, including inadequate notice of what evidence they needed to provide in order to prove that the rent increases were necessary for a fair return, the consideration of ex parte evidence, burdensome requests for information, and the rejection of uncontroverted expert evidence.[3]

The trial court rendered its initial decision in August 1994 finding that the *process* was arbitrary and unreasonable, depriving the Gallands of their procedural and substantive due process rights. (Pet. App. 20.) In October 1995, after a hearing on damages, the trial court separately held that the limited rent increases were *confiscatory* because the Gallands needed the rent increases to obtain a constitutionally guaranteed return of 20-25%. (Pet. App. 30.)

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[3] The Gallands assert that the first burdensome request for information occurred in August 1988 after the City Council approved an order for further proceedings which contained a list of detailed information that the Gallands should provide to justify the rent increases. (Pet. App. 8-9.) The record reflects that the Gallands had substantial input into the content of the order. The Gallands state at page 5 of their petition that Clovis compounded the burdensome request by initially providing one week to provide the requested information. This statement is wrong. The City Council issued the order for further proceedings on August 29, 1998. The Gallands were provided until October 14, 1998, to provide the information.

The California Supreme Court, relying upon precedent from this Court's recent decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) and from the D.C. Circuit Court of Appeals in *Silverman v. Barry*, 845 F.2d 1072 (D.C. Cir. 1988), held that a substantive due process violation will exist only if the former Rent Review Commission or the City Council deliberately flouted the law when making their decisions. The California Supreme Court remanded the matter to the trial court to apply this standard.

On the confiscatory rent issue, the California Supreme Court held that the trial court made fundamental errors in concluding that the approved rent increases were confiscatory and remanded the matter to the trial court for reconsideration of this issue. To assist the court on remand, the Court provided considerable guidance as to what constitutes a confiscatory rate of return. (Pet. App. 2, 30-34.) If the trial court finds that the limited rent increases were confiscatory, the Court held, consistent with its earlier decision in *Kavanau v. Santa Monica Rent Control Board*, 16 Cal. 4th 761, 782-786 (1997), *cert. denied*, 522 U.S. 1077 (1998), that the matter should be remanded to the City of Clovis for a readjustment of the rents to eliminate the confiscatory effect.[4] If such a remand occurs, the procedures under Clovis' new rent control ordinance would apply. Clovis adopted a new ordinance in 1993, long before the trial court rendered its decision.

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[4] If a readjustment of rents is not sufficient to compensate the Gallands, the Court concluded that the Gallands would be able to pursue a claim for compensation measured by an adequate rate of return. (Pet. App. 27, 36-37.)

(Pet. App. 4, 37.) Under the new ordinance, all matters are heard in accordance with strict time lines before a professional hearing officer, preferably with expertise in rental dispute mediation, selected with input from both sides. There is no rent review commission and there are no appeals to the City Council. (App. 1-7; Clovis, Cal., Ordinance 93-23 (eff. Dec. 1, 1993), Municipal Code §§ 5-13.14 through 5.13.16.)[5]

REASONS FOR DENYING THE WRIT–

1. There is No Final Judgment on the Issue of Whether the Rents Were Confiscatory or on the Issue of Whether the Rent Review Hearing Procedure Violated the Gallands' Substantive Due Process Rights.

The trial court will determine upon remand, by application of the guidelines articulated by the California Supreme Court, whether the rent ceilings imposed by Clovis were confiscatory. Any challenge before this Court based upon a confiscatory rent theory is premature. There is no final judgment upon this issue.

The trial court will determine upon remand, by application of the proper standard for gauging Constitutional injury as articulated by the California Supreme Court, whether the City violated the Gallands' substantive due process rights by any of the actions it took

[5] Contrary to the Gallands' contention, if this case goes back to Clovis, there will not be six hoops to jump through. (Pet. App. 8-9.) Nor will the case be remanded back to the same officials. (Pet. App. 14.)

during the rent review hearings. There is no final judgment upon this issue.

The Court does not have jurisdiction to grant the writ of certiorari because further proceedings are contemplated before there is a final judgment on the Constitutional issues. (28 U.S.C. § 1257; *Florida v. Thomas, supra,* 121 S. Ct. at pp. 1908-1909; *San Diego Gas & Electric Co., supra,* 450 U.S. at p. 633.)

2. Neither the Decision Below Nor the Record Raises the Questions Presented in the Petition.

The questions presented by the Gallands are premised on a trial court finding that the City imposed confiscatory rents by denying the Gallands a reasonable return. The California Supreme Court overruled this finding because of fundamental errors made by the trial court. (Pet. App. 2, 30-34.) Thus, missing from this case is the essential factual predicate for the questions presented. It is to be determined by the trial court upon remand whether the City imposed confiscatory rents or violated the Gallands' substantive due process rights.

3. The California Supreme Court Properly Concluded that in the Price Regulation Context there is No Constitutional Injury and No Section 1983 Cause of Action When the Availability of Rent Adjustments Would Eliminate any Confiscatory Rent Ceiling.

The California Supreme Court held, relying upon its earlier decision in *Kavanau, supra,* 16 Cal.4th at pp. 782-786, that no constitutional injury occurs when future rent adjustments can compensate for a confiscatory rent

ceiling. (Pet. App. 22-28.) The Court held that, in the context of price regulation, it is immaterial whether the alleged constitutional injury is phrased as a taking or as a violation of substantive due process. (Pet. App. 27.)

The California Supreme Court's holding is entirely consistent with this Court's decisions in price regulation cases dating back to 1930. (*United Railways and Electric Co. of Baltimore v. West*, 280 U.S. 234 (1930) (*United Railways*), *Federal Power Commission v. Natural Gas Pipeline Co. of America*, 315 U.S. 575 (1942) (*Natural Gas Pipeline*), *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) (*Hope Natural Gas*), *In re Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) (*Permian Basin*), *Federal Communications Commission v. Florida Power Corporation*, 480 U.S. 245 (1987) (*Florida Power Corporation*), *Duquesne Light Company v. Barasch*, 488 U.S. 299 (1989) (*Duquesne*).) In all of these cases the issue before this Court was whether a limitation upon rates charged by a regulated industry was confiscatory in the "constitutional sense." In the earlier decisions, this Court appeared to equate confiscation with a violation of the Fourteenth Amendment due process clause. (*United Railways*, *supra*, 280 U.S. at p. 252, *Natural Gas Pipeline*, *supra*, 315 U.S. at p. 586.) In more recent cases, this Court seemed to equate confiscatory rates with the Fifth Amendment takings clause. (*Florida Power Corporation*, *supra*, 480 U.S. at p. 253, *Duquesne*, *supra*, 488 U.S. at p. 308.)

Regardless of how phrased, this court held in each case that there is no Constitutional violation unless the regulated rates fall below the minimum necessary to avoid confiscatory results. (*Natural Gas Pipeline*, *supra*, 315 U.S. at p. 585, *Duquesne*, *supra*, 488 U.S. at p. 307.) In so

holding, the Court held, if not expressly then by implication, that there can be no constitutional violation if there is the ability to adjust the rates to avoid confiscatory results. Such a remedy prevents a constitutional injury from occurring in the first instance. There is a practical aspect to this holding. First, such a remedy avoids putting the reviewing court in the position of having to calculate what is the lowest rate to avoid confiscatory results. (*Duquesne, supra,* 488 U.S. at p. 314, *Natural Gas Pipeline, supra,* 315 U.S. at pp. 585-586, *Kavanau, supra,* 16 Cal.4th at p. 784, *New England Telephone and Telegraph Co. v. Department of Public Utilities,* 97 N.E.2d 509, 517 (Mass. 1951).) Second, such a remedy places the cost of compensating the injured party on the persons who benefitted from the confiscatory rate. (*Kavanau, supra,* 16 Cal.4th at p. 784.)

In *Mountain Water Company v. Montana Department of Public Service Regulation,* 919 F.2d 593, 600 (9th Cir. 1990), the Ninth Circuit, relying on this Court's decisions cited herein, held that requiring a privately owned water utility to reimburse customers for certain repair costs to individually owned lines did not violate the Constitution since the utility could obtain compensation for those costs through rate increases. A constitutional violation occurs only if the rate increase fails to compensate the utility company.

Other state courts that have had occasion to consider the issue of confiscatory prices in the rent control context have reached the same result. Massachusetts, New Jersey, and New York all hold that the remedy for confiscatory rents is to remand for a readjustment of rates to allow a just and reasonable return. (*New England Telephone and*

Telegraph Company, supra, 97 N.E.2d at pp. 515, 520, *Zussman v. Rent Control Board of Brookline,* 343 N.E.2d 889, 894-895 (Mass. 1976); *Park Tower Apartments, Inc. v. City of Bayonne,* 447 A.2d 1359, 1364-1366 (N.J. 1982), relying upon the New Jersey Supreme Court decision of *Troy Hills Village v. Township of Parsippany,* 350 A.2d 604 (N.J. 1975); *Tager v. Commissioner of the Department of Rent and Housing Maintenance,* 320 N.Y.S.2d 947, 951 (1971), *Dobson Factors, Inc. v. Temporary State Housing Rent Administrator,* 178 N.Y.S.2d 893, 894 (1957).) This remedy is proper even after lengthy delays. (*Park Tower Apartments, Inc. v. City of Bayonne, supra,* 447 A.2d at p. 1366, *Zussman v. Rent Control Board of Brookline, supra,* 343 N.E.2d at p. 895.)

The California Supreme Court's decision in this case is consistent with decisions from this Court, the Ninth Circuit, and other state courts that have considered the issue. The California Supreme Court does not hold, contrary to *Patsy v. Florida Board of Regents,* 457 U.S. 496 (1982), that landlords must exhaust administrative remedies before seeking constitutional damages. The prospective rent remedy prevents a constitutional injury from occurring.

In the most recent case from this Court involving economic regulation and due process, this Court held that a California contractor denied payments without a pre- or post-deprivation administrative hearing for failing to pay prevailing wages did not have a Section 1983 due process cause of action. *Lujan v. G & G Fire Sprinklers, Inc.,* ___ U.S. ___, 121 S. Ct. 1446 (2001). This Court observed that the contractor only had a claim to be paid in full and California afforded the contractor "sufficient opportunity

to pursue that claim in state court." Under these circumstances, this Court held that the "ordinary judicial process" available to the contractor will satisfy due process. (121 S. Ct. at pp. 1450-1451.)

Similarly here, the Gallands only had a claim to the requested rent increases. There has always been an available remedy through California's writ of mandate procedures to review rent increases to determine if they are confiscatory. (See, for example, most recently *Carson Harbor Village Ltd. v. City of Carson Mobile Home Park Rental Review Board*, 70 Cal.App.4th 281, 287 (1999).) The California Supreme Court in this case and in its earlier *Kavanau* decision reaffirmed the availability of a judicial remedy to review the adequacy of rent review determinations. The California Supreme Court also clarified that if upon judicial review it is determined that a rent increase is confiscatory, an amount of rent necessary to avoid confiscatory results shall be required.

The Gallands contend that *Lujan* has no application because it is strictly a procedural due process case and that this case involved an inadequate process invoking both procedural and substantive due process issues. In *Lujan*, the contractor was completely denied a hearing. A complete denial of a hearing can be equated with a claim of an inadequate hearing. The Gallands also contend that, unlike the contractor in *Lujan* which merely had a contract claim, they have a Constitutional right to reasonable rents. This is a distinction without a difference. In both cases, the petitioners merely have an unperfected claim to receive money. The *Lujan* contractor had not yet proven an entitlement to additional payments, and the Gallands have not yet proven an entitlement to higher rents. What

payments the contractor can recover and what rents the Gallands can collect is the issue to be decided upon judicial review.

In deciding *Lujan*, this Court did not inject uncertainty into this area of law. This Court merely recognized that in most circumstances a state's judicial process will satisfy due process requirements. The principals of *Lujan* are applicable to this case.

4. In Further Proceedings Upon Remand the Gallands Will Have an Opportunity to Prove a Violation of Substantive Due Process Arising out of the Nature of the Rent Review Hearings

The Gallands alleged in their complaint that they were deprived of both procedural and substantive due process rights because they were forced to participate in arbitrary and unreasonable administrative proceedings. (Pet. App. 20-38.) While unfair hearings are generally equated with procedural due process violations easily remedied under California's writ of mandate procedures,[6] the California Supreme Court nonetheless decided that a seriously defective rent control process could inflict a substantive due process injury. The issue before the court was what standard should be applied to determine if the actions of Clovis during the rent review proceedings violated the Gallands' substantive due process rights.

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[6] California Code of Civil Procedure, sections 1067 et seq. (West 1980), California Rules of Court, Rule 56 (West 1996). See, in particular, Sections 1085 and 1094.5 pertaining to writs of mandate.

Clovis urged the lower courts to adopt the "shock the conscience" standard utilized by this Court for finding a substantive due process violation as most recently set forth in *County of Sacramento, supra,* 523 U.S. 833, and as set forth by the New Jersey Supreme Court in *Rivkin v. Dover Township Rent Leveling Board,* 671 A.2d 567 (N.J. 1996). In *County of Sacramento, supra,* 523 U.S. at pp. 836-837, a deputy sheriff conducted a high-speed chase in violation of department policy which resulted in the death of a suspect fleeing the sheriff. The suspect's parents and the estate sued the county under Section 1983 claiming that the officer violated the suspect's substantive due process rights. This Court held that a violation of substantive due process requires a showing that the sheriff's conduct "shocked the conscience" of the Court. (523 U.S. at p. 846.) In reaching its decision this Court specifically noted:

> "While due process protection in the substantive sense limits what the government may do in both its legislative, [citations omitted], and its executive capacities, [citations omitted], criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue." (523 U.S. at p. 846.)

When a specific act of a government official is at issue the standard is "shock the conscience."

> "Our cases dealing with abusive executive action had repeatedly emphasized that only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense,' . . . . To this end, for a half a century now we have spoken of the cognizable level of executive

abuse of power as that which shocks the conscience." (523 U.S. at p. 846.)

In *Rivkin, supra,* 671 A.2d at pp. 570-571, a case similar to this one, Dover Township, New Jersey had a mobile home park rent leveling ordinance which required owners of mobile home parks to apply to the Dover Township Rent Leveling Board ("Board") for mobile home park increases. The Board was made up of one mobile home park owner, one mobile home park tenant, and three nonaffiliated public members. The Rivkins, owners of one of the mobile home parks, filed an application for a rent increase to cover the expense of capital improvements. The Board conducted four hearings on the application. The tenant-member of the Board took an active part in the proceedings and actually became an advocate for the tenants. He "continually challenged the Rivkins and their representatives both on a personal basis, referring to their attorney as a 'yo-yo,' and on a partisan basis, introducing facts from outside the record." The Rivkins requested that the tenant-member be removed from the proceedings which the Board denied. The Board awarded the Rivkins approximately one-third of the requested rent increase. The court, in determining whether any of the actions that occurred during the rent review proceedings violated the Rivkins' substantive due process rights, thoroughly examined the history behind the doctrine of substantive due process and how the substantive due process doctrine has been applied by this Court. The New Jersey Supreme Court determined that the shock the conscience standard is the appropriate standard in evaluating substantive due process claims.

The court held:

> "[S]ubstantive due process is reserved for the most egregious governmental abuses against liberty or property rights, abuses that 'shock the conscience or otherwise offend . . . judicial notions of fairness . . . [and that are] offensive to human dignity.' [Citation omitted.] With the exception of certain intrusions on individual's privacy and bodily integrity, the collective conscience of the United States Supreme Court is not easily shocked." (671 A.2d at pp. 574-575.)

Further:

> "[T]he conduct of an errant board member who berated an applicant and brought in facts outside the record at a rent proceeding in violation of acceptable board practice does not rise to the level of a substantive due process violation under the Supreme Court's standards." (671 A.2d at p. 575.)

The California Supreme Court, after reviewing these cases and a line of other cases from the United States courts of appeals, observed that despite the variety of verbal formulations, it is clear that "the arbitrary government conduct that triggers a substantive due process violation is not ordinary government error but conduct that is in some sense outrageous or egregious – a true abuse of power. [Citations omitted.]" (Pet. App. 41-42.)[7]

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[7] The 9th Circuit Court of Appeals recently observed that "the use of substantive due process to extend Constitutional protection to economic and property rights has been largely discredited. (*Armendariz v. Penman*, 75 F.3d 1311, 1318-1319 (9th Cir. 1996).)

The court went on to formulate the appropriate substantive due process standard for determining "when an administrative body charged with implementing a law acts erroneously in such a way as to injure an individual's economic and property interests." (Pet. App. 44.) The court adopted a variant of the shock the conscience standard by looking to the D.C. Circuit Court of Appeals and held that the appropriate standard is "deliberate flouting of the law."[8] Under this standard, inadvertent errors, honest mistakes, agency confusion, even negligence in the performance of official duties would not amount to a violation of substantive due process. In adopting the standard, the California Supreme Court specifically held that the standard is consistent with this Court's decision in *County of Sacramento* observing that substantive due process only encompasses the most egregious official conduct when government officials abuse their power. "It cannot be said to encompass governmental mistakes and bureaucratic errors that are something less than an abuse of power." (Pet. App. 45.)

After articulating the standard, the court remanded the matter to the trial court to apply that standard to the conduct of Clovis during the rent review proceedings. (Pet. App. 53.)[9] Thus, rather than denying relief, the

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[8] *Silverman v. Barry, supra,* 845 F.2d 1072.

[9] The Gallands state on page 13 of the petition that the home owners will be forced to pay for the costs associated with the City's "bureaucratic bungling." This is not true. If upon remand the Gallands can show that the former Rent Review Commission or City Council deliberately flouted the law in any of the administrative requirements that the Gallands contend were arbitrary and burdensome, the Gallands will be entitled to recover damages from the City for that action. (Pet. App. 53.)

California Supreme Court articulated the standard to be used by the trial court in deciding whether relief is due.

To the extent that errors in rent review hearings can form a basis for recovery of damages under Section 1983, the California Supreme Court formulated the proper standard. To have a lesser standard would allow anyone dissatisfied with the outcome of an administrative hearing to bypass available state remedies and pursue a constitutional claim for damages. Under a lesser standard, procedural due process claims would routinely be recharacterized as substantive due process claims which would result in needless Section 1983 litigation. The standard formulated by the California Supreme Court is a reasonable and workable standard consistent with this Court's decision, other state courts, and with the United States courts of appeals that have had occasion to address the substantive component of the due process clause. (Pet. App. 41-42.)

CONCLUSION

There were two distinct issues before the California Supreme Court. The confiscatory rent issue and the abusive process issue. The Gallands have blurred the two issues in an attempt to create a picture that the California Supreme Court has refused to follow the dictates of *Patsy*. From that flawed premise, the Gallands ask this Court to correct what they claim are abuses by the California Supreme Court in land use and takings cases from 20

years ago.[10] This is not a land use or a takings case. This is a narrow fact setting involving specific rules for price regulation in the rent control context. The land use issues raised by the Gallands should be raised in a case where those issues are truly before this Court.

It should be emphasized that there has never been a lawful determination that the rent increases approved by Clovis were confiscatory. It may be that the Gallands were receiving a just and reasonable return.[11] This issue is to be decided by the trial court upon remand. The California Supreme Court provided substantial guidance for the trial court on how to make that determination so that the trial court's decision is not again "fundamentally flawed." In establishing those guidelines, the California Supreme Court has decided what the State's substantive law is and this Court should honor that determination. Upon remand, the trial court will also decide whether asserted abuses that occurred during the rent review hearings were of such significance as to constitute a violation of substantive due process in accordance with the standard articulated by the California Supreme Court

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[10] The Gallands reference that 11 of the 22 land use cases decided by this Court since 1978 arose in California. Assuming that the Gallands' statistics are correct, the Gallands neglect to mention that of those 22, only two (*Pennell v. City of San Jose*, 485 U.S. 1 (1988) and *Yee, supra*, 530 U.S. 519, involved rent control and this Court affirmed the decisions in both of those cases.

[11] The trial court found that the Gallands were Constitutionally entitled to a 20-25 % return. (Pet. App. 30.) The California Supreme Court questioned whether such a high rate of return is the minimum required to avoid confiscatory results. (Pet. App. 30.)

based upon decisions of this Court. Rather than denying the Gallands relief, the California Supreme Court has afforded the Gallands an opportunity for substantial relief.

Clovis respectfully prays this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

THOMAS J. RIGGS, *Counsel of Record*
DAVID J. WOLFE
LOZANO SMITH
285 W. Bullard Avenue, Suite 101
Fresno, CA 93704
(559) 431-5600

Counsel for Respondents

5.13.14 Rent review hearing.

(a) Upon receipt of a timely and completed petition for rent review, along with the completed concurrent response, the City Manager shall refer the petition for a hearing.

(b) A hearing officer shall be appointed in the following manner:

The City Manager shall develop a list of at least three (3) nominees, and the home owners or park owners may submit a list of additional nominees to the City Manager. All nominees shall:

(1) Be licensed attorneys by the State Bar of California in good standing;

(2) Have professional experience as hearing officers or arbitrators with particular expertise in rental dispute mediation or with experience or training showing the capabilities to deal with the issues found in the rental dispute. Preferably, the hearing officer will have had at least two (2) hearings or arbitrations concerning rent disputes between mobile home park owners and mobile home owners;

(3) Not own an interest in a mobile home park, not be a home owner in a mobile home park, not be an employee, officer, member or otherwise affiliated with any group or organization which has or is viewed by a significant number of park owners or home owners as having taken advocacy positions in rent control matters.

The list of nominees shall include the resumes of each detailing their qualifications. The City Manager shall periodically review its list of nominees, and with

respect to nominees submitted by the home owners or park owners, the City Manager shall review the list and conduct such investigation and/or interviews as he or she deems necessary. The City Manager shall consult with both parties in an attempt to select a hearing officer acceptable to both. In the event of disagreement by either or both of the parties, the City Managers selection shall be final.

(c) The hearing officer shall be selected within thirty (30) days of receipt of the park owner's cash deposit. An extension may be granted upon stipulation of the parties, or for good cause as determined by the City Manager. The maximum period of extension shall be fifteen (15) days.

(d) The hearing officer shall conduct a hearing with the parties, and/or their designated representatives, within thirty (30) days of the date the hearing officer was selected. Prior to conducting the hearing, the hearing officer shall review the notice of rent increase and the petition and concurrent response. The hearing officer shall define the issues to be decided at the hearing and shall notify the parties in advance of the issues. Prior to conducting the hearing, the hearing officer may choose to meet only with the designated representatives of one of the parties at a time.

(e) The hearing shall be informally conducted, and the technical rules of evidence shall not apply, except that irrelevant and unduly repetitious evidence shall be excluded. All evidence shall be received only on oath or affirmation. Each party shall have the right to (1) call and examine witnesses on any matter relevant to the issues of

the hearing; (2) introduce documentary and physical evidence; (3) cross-examine opposing witnesses on any matter relevant to the issues of the hearing; (4) impeach any witness regardless of which party first called the witness to testify; (5) rebut the evidence; and (6) to be represented by anyone who is lawfully permitted to do so. The hearing officer shall direct the order of the proceedings.

(f) The burden of proving the reasonableness of the proposed rent increase shall be on the park owner. The burden of proving a reduction in services, which are not acknowledged by the park owner, shall be on the affected mobile home owners alleging that a reduction in services has occurred.

(g) During the hearing process, the concerns of each party shall be discussed and the hearing officer shall indicate the amount and nature of any further information he or she will need from any party in order to reach a determination. All information submitted shall be in writing and shall be certified in the same manner as set forth in Section 5.13.08. Copies of any information submitted to the hearing officer shall be provided to the other party. Each party shall comply with the hearing officer's request for information within ten (10) working days of the request. For good cause, a reasonable extension of time to comply with the hearing officer's request may be granted by the hearing officer in up to ten (10) day increments, for a maximum extension of twenty (20) days. The hearing officer may proceed under this part regardless of whether any party defaults in providing any of the requested information.

(h) The hearing officer may take official notice, either during the hearing, or after submission of the matter for decision, of any fact which may be judicially noticed by the courts of this state or of official records, regulations, rules, and decisions of state and local agencies, boards and departments, and of city and county ordinances. In addition, the hearing officer may take official notice of matters in its own files and of prior proceedings under this chapter involving the same issues. If applicable, the hearing officer may also take official notice of any generally accepted technical or scientific matter within the hearing officer's expertise. The parties present at the hearing shall be informed of the matters to be noticed, and those matters should be noted in the record, referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority.

(i) The hearing officer may issue a subpoena for the attendance of witnesses or the production of other evidence at a hearing upon the hearing officer's own initiative, or upon the written demand of any party. The issuance of such subpoena shall be obtained upon the filing of an affidavit therefor which: (1) states the name and address of the proposed witness; (2) specifies the exact things sought to be produced and the materiality thereof in detail to the issues involved; and (3) states that the witness has the desired things in his or her possession or under his or her control. A subpoena need not be issued when the affidavit is defective in any particular. Any person who refuses without lawful excuse to attend any hearing, or to produce material evidence which the

person possesses or controls as required by any subpoena served upon such person as provided for herein shall be guilty of a misdemeanor.

(j) A record of the entire proceedings shall be made by tape recording or by any other means of permanent recording determined to be appropriate by the hearing officer. The proceedings at the hearing shall also be reported by a stenographic reporter if requested by any party thereto. A transcript of the proceedings shall be made available to all parties upon request and upon payment of the fee prescribed therefor. Such fees may be established by the hearing officer, but shall in no event be greater than the costs involved.

(k) If, during the hearing process, the parties agree to a specific rental increase or to a settlement of the dispute in question, the hearing officer shall prepare a memorandum of agreement so specifying the amount of such increase and/or the terms of settlement. The memorandum of agreement shall be executed by the owner and the home owners of their designated representative(s). The memorandum of agreement shall be final and binding upon the parties and shall not be subject to rent review or further appeal under this chapter. (§ 1, Ord. 92-23, eff. December 1, 1993)

5.13.15 Hearing: Determination: Effective date of rent increase.

If a memorandum of agreement is not executed by the parties in accordance with Section 5.13.14(k) the hearing officer shall render his or her decision. In the case of a rent increase dispute, the hearing officer shall determine

the amount of allowable rental increase, if any, in accordance with the standards of Section 5.13.05, if applicable, and Section 5.13.17, and the increase, if any, shall be effective the date the hearing officer's decision becomes final, or one hundred ninety-five business days after the notice of the rent increase is given, whichever is sooner. (§ 1, Ord. 92-23, eff. December 1, 1993)

5.13.16 Hearing: Determination final: Conditions: Costs: Judicial review.

(a) The determination of the hearing officer shall be final, and shall be delivered to the City Manager and the parties in writing, together with written findings of fact supporting such determination within fifteen (15) working days of the close of the hearing. The date the hearing officer issues his or her decision shall be deemed the date the decision becomes final for purposes of seeking judicial review.

(b) The hearing officer's determination may be reasonably conditioned in any manner necessary to effectuate the purposes of this chapter.

(c) If the hearing officer finds that the proposed rent increase above that which is exempt from review was frivolous and totally lacking in merit, the hearing officer may in its discretion require the park owner to pay to petitioners all or part of petitioners' costs of the hearing. If the hearing officer finds that the petition was frivolous and totally lacking in merit, the hearing officer may in its discretion require the petitioners to pay to the park owner all or part of the park owner's costs of the hearing. For purposes of this subsection "costs of the hearing"

means those costs recoverable in a court action pursuant to California Code of Civil Procedure Section 1033.5, and shall also include the costs of the hearing officer, but shall not include the costs for professional services incurred by a park owner or home owner.

(d) Any proceeding to obtain judicial review shall be filed within ninety (90) days after the decision of the hearing officer becomes final. (§ 1, Ord. 92-23, eff. December 1, 1993)